No. 75-1640

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL DYNAMICS CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion. The opinion and order of the Federal Trade Commission (Pet. App. 3a-15a) are not yet officially reported.

JURISDICTION

The order of the court of appeals was entered on February 10, 1976 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on May 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission's order was arbitrary and capricious because it prohibited petitioners from advertising profits that dealers "can or will" make rather than only prohibiting advertisement of profits dealers "will" make.

2. Whether the order infringed petitioners' First Amendment rights.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is reproduced at Pet. App. 20a-29a.

STATEMENT

Petitioners market a battery additive, VX-6, which is sold to dealers for resale. The Federal Trade Commission determined that petitioners' advertising of VX-6 was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (C.A. App. 83a-113a).[1] The Commission found that petitioners used the unusually high earnings of a few distributors, or hypothetical potential earnings, to misrepresent the earnings which could normally be expected by distributors of VX-6 (C.A. App. 111a).

The court of appeals upheld the Commission's finding but ruled that the wording of portions of the Commission's order was unclear and unduly restrictive with respect to representations of actual earnings. The court remanded the case to the Commission for revision of the relevant paragraphs of the order, but otherwise affirmed and enforced the order (Pet. App. 16a-18a; 492 F. 2d 1333). This Court denied certiorari, 419 U.S. 993.

On remand, the Commission revised its order to permit petitioners to advertise actual earnings of VX-6 distributors, while requiring specific affirmative disclosures in connection with such advertising when it used unrepresentative examples (Pet. App. 12a-15a). The court of appeals summarily affirmed (Pet. App. 1a-2a).

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[1]"C.A. App." refers to petitioners' printed appendix in the court of appeals.

ARGUMENT

1. Petitioners contend that the Commission's revised order fails to comply with the court of appeals' limited remand and arbitrarily restricts their advertising (Pet. 6-10). Petitioners primarily contend that the Commission improperly barred them from representing that dealers in their products "can or will" make any stated amount of sales, profits or earnings from their resale. Petitioners point to certain nonlitigated cases in which the Commission had accepted consent orders that only prohibit representations that purchasers "will" make such earnings (Pet. 6-7).

The Commission is not required, however, to enter identical relief in all generally similar cases. Where a case is settled by a consent order, the Commission properly may accept less stringent relief than where, as here, the order is the product of a contested proceeding. Cf. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413.

Petitioners also argue that the decision conflicts in principle with a prior decision of the same court of appeals (Pet. 8-9).[2] But any such intra-circuit conflict is for the court of appeals, not for this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902.

2. Petitioners also contend that the revised order constitutes an unconstitutional prior restraint of their freedom of speech because it prohibits them from making some

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[2]In that case, *Federated Nationwide Wholesalers Service* v. *Federal Trade Commission*, 398 F.2d 253 (C.A. 2), the court vacated an order prohibiting the petitioners there from representing themselves as "wholesalers" but allowing them to prove that they were "wholesalers" as a defense if challenged in any enforcement procedure by the Commission. That somewhat peculiar order is not analogous to the order here.

truthful representations of past or present earnings of dealers in their products (Pet. 7-9). The order essentially prohibits petitioners from advertising profits earned by dealers (as an inducement to new dealers) without revealing whether the figures used are typical and thus not misleading (See Pet. App. 12a-14a). In light of petitioners' prior misuse of such figures, this is an appropriate remedy. *Bigelow* v. *Virginia*, 421 U.S. 809, on which petitioners rely, does not impair the well-established authority of the government to restrain those who have engaged in false, misleading or fraudulent commercial advertising. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, No. 74-895, decided May 24, 1976, slip op. 22-25.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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